APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-4280EMSL

Allen DeBord, etc., et al.,
Appellants,

vs.

Board of Education of the
Ferguson-Florissant School District, et al.,
Appellees.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc.

The joint suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 14, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-4280EM

Allen DeBord, Individually and as
next friend for Kelly DeBord; Debra DeBord, Individually
and as next friend for Kelly DeBord,

Appellants,

v.

Board of Education of the Ferguson-Florissant School District; Shirley Salmon; Joyce Dreimeier; Cindy Ormsby,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: September 11, 1997
Filed: October 9, 1997

Before FAGG, WOLLMAN, and LOKEN, Circuit Judges.

FAGG, Circuit Judge.

In this student disability discrimination case, parents Allen and Debra DeBord appeal the district court's grant of summary judgment to the Board of Education of the Ferguson-Florissant School District and three individual defendants (collectively the school district). We affirm.

The DeBords' eight-year-old daughter, Kelly, has attention deficit hyperactivity disorder (ADHD). To treat her condition, Kelly's doctor prescribed one hundred milligrams of sustained release Ritalin when Kelly arises in the morning, and forty milligrams of the drug at 3:00 in the afternoon while Kelly is still at school. The school district provides health services to stu-

dents, including administration of prescription drugs during school hours, but the school district has a written policy against administering prescription drugs in an amount exceeding the recommended daily dosage listed in the *Physicians' Desk Reference* (PDR). Joyce Dreimeier, the nurse at Kelly's elementary school, refused to give Kelly her afternoon dose because Kelly's daily intake of Ritalin exceeds the sixty milligram daily recommendation listed in the PDR. The DeBords appealed to the Board of Education, providing a letter from Kelly's doctor confirming her prescription, some medical information about high dose use of Ritalin, and an offer to sign a waiver of liability. The school board declined to direct administration of Kelly's prescription by the school, even though Kelly's higher dosage is necessary to treat her effectively, Kelly suffers no side effects, and no studies show whether higher dosages are harmful. Instead, the school board offered several alternatives, including alteration of Kelly's class schedule to permit early dismissal and home administration of both of Kelly's doses, or administration of Kelly's afternoon dose at school by one of her parents or someone designated by them.

Unhappy with the school district's stance, the DeBords brought this action alleging the school district's refusal violates section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994); Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-12165 (1994); and 42 U.S.C. § 1983 (1994). The district court granted summary judgment to the school district. The district court concluded the school district's refusal was not based on Kelly's disability, but on the district's policy stemming from concerns about potential harm to students and liability. The district court also concluded the school district reasonably accommodated the DeBords.

We review the grant of summary judgment de novo. *See Smith v. City of Des Moines*, 99 F.3d 1466, 1468 (8th Cir. 1996). We affirm if the record, viewed in the light most favorable to the

DeBords, shows there is no genuine issue of material fact and the school district is entitled to judgment as a matter of law. *See id.* at 1469. Before we turn to the DeBords' contentions, we examine the discrimination law that guides us.

Both the Rehabilitation Act and the ADA prohibit discrimination on the basis of disability. The Rehabilitation Act provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a) (1994). Under regulations implementing the Rehabilitation Act, a recipient of federal funds "that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person," 34 C.F.R. § 104.33(a) (1996), including "the provision of regular or special education and related aids and services," *id.* § 104.33(b)(1). A recipient must give disabled students an equal opportunity to participate in nonacademic and extracurricular services, including health services. *See id.* § 104.37(a). The Rehabilitation Act requires a recipient of federal funds to provide "an otherwise qualified handicapped individual . . . with meaningful access to the benefit that the grantee offers." *Alexander v. Choate*, 469 U.S. 287, 301 (1985). To assure meaningful access, the grantee may have to make reasonable accommodations in its program or benefit. *See id.* & n.21; *Alexander v. Pathfinder, Inc.*, 91 F.3d 59, 62 (8th Cir. 1996); *Lloyd v. Housing Auth.*, 58 F.3d 398, 399 (8th Cir. 1995).

After the Rehabilitation Act had been law for several years, Congress enacted the ADA. Title II of the ADA, applicable to public entities including public schools, states that "no qualified individual with a disability shall, by reason of such disability, . . . be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such

entity." 42 U.S.C. § 12132 (1994). Title II regulations require a public entity to "make reasonable modifications in policies . . . when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service." 28 C.F.R. § 35.130(b)(7) (1996). Congress intended Title II and its implementing regulations to be consistent with the Rehabilitation Act and its regulations. *See Pottgen v. Missouri St. High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994); *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459-60 (6th Cir. 1997) (*en banc*); *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727-28 (10th Cir. 1996). To succeed on their claims under either Act, the DeBords must show the school district refused to administer Kelly's medication because of her disability. *See Davis v. Francis Howell Sch. Dist.*, 104 F.3d 204, 206 (8th Cir. 1997); *McPherson*, 119 F.3d at 460.

The DeBords argue the school district's refusal to provide the nonacademic service of drug administration denies Kelly a free appropriate education because without her full dosage of Ritalin, she cannot benefit from the school's educational program. *See* 34 C.F.R. §§ 104.33(a), .33(b)(1) (1996). The administrative agency charged with enforcing the Rehabilitation Act in school districts has held that when a "handicapped student[] requires the administration of medication in order to benefit from his or her educational program, the [school district] is obligated to ensure that the medication is administered." *Berlin Brothersvalley (PA) Sch. Dist.*, OCR Region III, 353:124 (Dec. 23, 1988). The agency concluded the Berlin district's policy granting school officials unspecified discretion to decline administration of medication and requiring the student's parents to release the district from liability violated 34 C.F.R. §§ 104.33(a) and (b)(1). The DeBords rely heavily on this agency interpretation, and say we must give it substantial deference. *See Blum v. Bacon*, 457 U.S. 132, 141 (1982).

Unlike the drug administration policy in *Berlin*, the policy here contains an objective standard limiting administration of prescription medication only when the prescription exceeds the maximum dosage recommended in the PDR. There is no evidence that the school district had disabilities in mind when formulating or implementing its policy. The DeBords do not question the truthfulness of the school district's expressed motivations of fear of student harm and potential liability. Instead, the DeBords say the fears are invalid. Whether or not ill-founded, however, the school district's fears are unrelated to disabilities or misperceptions about them. The policy is neutral; it applies to all students regardless of disability. A student's excess prescription, not the student's disability, prevents the student from receiving medication from the school nurse. *See McPherson*, 119 F.3d at 460-61. Although Kelly requires Ritalin to treat her disability, it is undisputed that the reason for Kelly's high dosage is probably her metabolism, not the severity of her disability. Kelly's own doctor and others stated the amount of Ritalin needed to treat ADHD is unrelated to the severity of the disorder in any particular patient. Thus, the policy does not discriminate against the severely disabled, as the DeBords assert.

The DeBords argue Kelly was treated differently than other students, but students who received their medication at school did not have prescriptions exceeding the PDR's recommended daily dosage. It is undisputed that the school district did not knowingly administer prescription drugs to any student, disabled or not, in excess of the PDR's recommendation. Disparate treatment is not the only way to prove unlawful discrimination, but the record here offers no other basis to infer the school board's actions were based on Kelly's disability. *See Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 824 n.7 (8th Cir. 1997). The DeBords have not tried to show the policy has the effect of discriminating against the disabled or the severely disabled. On the record here, the school board's facially neutral

policy does not distinguish between those who will receive their full prescription dose and those who will not on the basis of any trait that the disabled or severely disabled are less or more likely to possess. *See Choate*, 469 U.S. at 302 (rejecting Rehabilitation Act claim that state's fourteen-day limit on Medicaid services had disparate impact on the disabled). In other words, the DeBords have not shown disabled students are more likely than nondisabled students to require prescription dosages exceeding the PDR's recommendation. Although Congress was concerned about the discriminatory effects of "overprotective rules and policies" on the disabled, 42 U.S.C. § 12101(a)(5), nothing here suggests the policy or its application has the purpose or effect of discriminating against disabled students.

The DeBords also rely on 42 U.S.C. § 12182(b)(2)(A)(ii), a Title III statute defining discrimination to include the failure to make reasonable modifications in policies. The DeBords assert the school district's failure to waive its policy for Kelly violates this statute. Title III of the ADA applies to private entities providing public accommodations, however, not to public entities. *See* 42 U.S.C. §§ 12181-82; *Sandison*, 64 F.3d at 1036. Entities subject to Title III include private schools, but not public ones. *See* 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104. It is unclear whether § 12182(b)(2)(A)(ii) from Title III applies in a Title II case. *See* 1 Henry H. Perritt, Jr., *Americans with Disabilities Act Handbook* § 5.3, at 201-02 & n.21 (3d ed. 1997) (preamble to ADA regulations says Title II intends to incorporate only those provisions of Titles I and III that are consistent with Rehabilitation Act regulations); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 47 (2d Cir. 1997) (Heaney, J., sitting by designation) (ADA's legislative history states Title II's prohibitions are to be identical to prohibitions of Titles I and III; no intent to excuse similar discriminatory conduct by public entities). Title II does not define discrimination as including the failure to make reasonable modifications, but a Title II regula-

tion states a public entity must make reasonable modifications in policies when necessary to avoid discrimination. *See* 28 C.F.R. § 35.130(b)(7) (1996); *see also Weinreich v. Los Angeles County*, 114 F.3d 976, 978-79 (9th Cir. 1997) (absent discrimination on basis of disability, no duty under this regulation to make reasonable modifications). On the other hand, public entities discriminate in violation of the Rehabilitation Act if they do not make reasonable accommodations to ensure meaningful access to their programs. *See Choate*, 469 U.S. at 301.

We need not resolve whether 42 U.S.C. § 12182(b)(2)(A)(ii) applies in a Title II case, or whether a reasonable modification or accommodation requirement applies absent a separate showing of discrimination. Even if either or both apply, we believe the school board's proposals to establish workable schedules so Kelly's family can give her the prescribed dosages of Ritalin satisfy these requirements, and anyway, the waiver requested by the DeBords is not a reasonable modification or accommodation. There is no precise reasonableness test, but an accommodation is unreasonable if it either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program. *See Pottgen*, 40 F.3d at 930; *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995). Although the school district has not made the assertion, adjudication of waiver requests would impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case. *See Pottgen*, 40 F.3d at 931. At this time, no one knows what the long term effects of high doses of Ritalin might be. A waiver of liability might not be effective, and statutory immunity might not apply. These concerns may be speculative, but they are not unreasonable. Significantly, the school district is not preventing Kelly from receiving the medicine she needs for learning. The school district offered to alter Kelly's class schedule to permit home administration of Kelly's medicine, or to allow Kelly's parents or their designee to

administer her medicine at school. Kelly's parents are able to give Kelly her schooltime dose. Like the district court, we conclude the school district reasonably accommodated Kelly's ADHD as a matter of law.

Because the school district did not discriminate against Kelly on the basis of her disability as a matter of law, the district court properly granted summary judgment to the school district on the DeBords' Rehabilitation Act and ADA claims. The failure to show a violation of the Rehabilitation Act or the ADA dooms the DeBords' § 1983 claims based on those federal laws. *See Hoekstra v. Independent Sch. Dist. No. 283*, 103 F.3d 624, 626 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1852 (1997); *Pottgen*, 40 F.3d at 931. The DeBords' § 1983 claim based on a violation of the Fourteenth Amendment's Equal Protection Clause also fails. The DeBords did not show the school district treated Kelly differently from other children with prescriptions exceeding the PDR's recommended dosage, and the school district's refusal to administer the excess dose is rationally related to the legitimate state interest of protecting students' health. *See Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994).

We affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:96-CV-634 (CEJ)

ALLEN DEBORD, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE FERGUSON FLORISSANT SCHOOL DISTRICT, et al.,

MEMORANDUM

[Filed: November 26, 1996]

This matter is before the Court on the cross motions of the parties for summary judgment. *See* Fed. R. Civ. P. 56.

The plaintiffs[1] bring this action pursuant to Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12131 *et seq.*; § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; and 42 U.S.C. § 1983, seeking damages and injunctive relief[2] requiring the defendants to administer medication to Kelly DeBord ("Kelly") in the amount and at the time prescribed by her physician. The plaintiffs allege that Kelly is a qualified individual with a disability within the meaning of Title II and § 504 of the Rehabilitation Act. They claim that the defendants are discriminating against Kelly based on her disability by depriving her of non-academic services otherwise pro-

[1] Plaintiffs Allen DeBord and Debra DeBord bring this action individually and as next friends of their daughter Kelly DeBord.

[2] On April 4, 1996, the Court denied the plaintiffs' motion for a temporary restraining order. On May 29, 1996, the Court denied the plaintiffs' motion for a preliminary injunction.

vided to non-disabled and less-severely disabled students. The plaintiffs further claim that defendants' actions violate plaintiffs' due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.

At the time the complaint was filed Kelly was a first grade student at Robinwood Elementary School in the Ferguson-Florissant School District. Kelly has been under the care and treatment of Dr. Sheldon Kessler since birth. In 1993, Dr. Kessler diagnosed Kelly with a severe case of Attention Deficit Hyperactivity Disorder ("ADHD"). Dr. Kessler treated Kelly's ADHD with sustained release Ritalin SR ("SR"). Dr. Kessler prescribed a 100 mg dosage of SR to be administered to Kelly when she arises in the morning and an additional 40 mg dosage to be given in the afternoon. Just prior to February 14, 1996, Dr. Kessler, in order to ensure that an effective level of SR remained in Kelly's system, moved the afternoon dosage to 3:00 p.m., before Kelly's school day ended. On February 15, 1996, Joyce Dreimeier, a school nurse at Robinwood, informed Kelly's mother, Debra DeBord, that she would not administer the 3:00 p.m., 40 mg dosage of SR to Kelly because this dose combined with Kelly's morning dose exceeded the daily recommended dosage of 60 mg set forth in the Physician's Desk Reference 1996.[3] On March 8, 1996, Dreimeier contacted Dr. Kessler about his prescribed dosage of SR. Dr. Kessler confirmed the correctness of the dosage and timing of Kelly's medication.

On March 13, 1996, the DeBords attended a Ferguson-Florissant Board of Education meeting and requested that the school nurse administer the 3:00 p.m. dose to Kelly. On March 21, 1996, Shirley Salmon, assistant superintendent, informed the

[3] District policy 3050 provides that the school nurse may determine, based on her professional judgment, whether a prescribed medication should be administered at school. The policy states that physician prescribed medications must be "cleared with the school nurse before being taken while in school."

DeBords by letter that the school would not administer the afternoon does. Nurses in the school district have continued to administer small prescription dosages of Ritalin to approximately 442 other students diagnosed with ADHD.

Although the total daily dosage of SR prescribed by Dr. Kessler is in excess of the range indicated in both the Physician's Desk Reference and in the prescribing information published by the manufacturer, Ciba-Geigy Corporation, no evidence has been submitted showing that Kelly suffers any significant ill effects from this dosage of Ritalin SR.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 474 U.S. 574, 586-87 (1986); Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleading but must set forth specific fact, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will hear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986).

I. TITLE II and Section 504

The plaintiffs argue that Kelly is being discriminated against in violation of Title II and § 504 because the school refuses to administer her medication while at the same time it administers medication to other students. In response, the defendants argue that the plaintiffs cannot establish a prima facie case of discrimination.

A similar analysis applies to both Title II and § 504 claims. *Pottgen v. Missouri State High School Activities Assoc.*, 40 F.3d 926, 930 (8th Cir. 1994). The remedies, procedures and rights are the same under both statutes, and the regulations interpreting Title II must be consistent with § 504 regulations. *Id.* Thus, it is appropriate to consider the Title II and § 504 claims together.

In order to establish a violation of either Title II[4] or § 504[5], the plaintiff must prove: (1) that she has a disability; (2) that she is otherwise qualified for the benefit in question; and (3) that she was excluded from the benefit due to discrimination solely on the

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[4] Section 12132 of Title II provides as follows:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 21312.

[5] Section 504 provides, in relevant part, as follows:

> No otherwise qualified handicapped individual . . . shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794.

basis of the disability. *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995); *Gieseking v. Schafer*, 672 F.Supp. 1249, 1262 (W.D. Mo. 1987). An individual cannot be excluded from programs or benefits solely because of the severity of his or her disability. *Conner v. Branstad*, 839 F.Supp. 1346, 1356 (S.D. Iowa 1993). As part of the "otherwise qualified" inquiry, the Court must determine whether some "reasonable accommodation" is available to meet the interests of the handicapped person and the service provider. *Lloyd v. Housing Authority of City of Kirksville*, 58 F.3d 398, 399 (8th Cir. 1995); *Doherty v. Southern College of Optometry*, 862 F.3d 570, 575 (6th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989); *Conner*, 839 F.Supp. at 1356. Thus, schools must make reasonable accommodations but do no, however, have to make "fundamental" or "substantial" modifications to their programs. *Alexander v. Choate*, 469 U.S. 287, 300 (1985). An accommodation is not reasonable if it imposes undue financial and administrative burdens or requires a fundamental alteration in the nature of the program. *Kohl v. Woodhaven Learning Center*, 865 F.2d 930, 936 (8th Cir. 1989), *cert. denied*, 493 U.S. 892 (1989)

In their motion, the defendants first argue that Kelly is not disabled within the meaning of Title II and § 504. Under § 504, a handicapped person is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities . . . ." 34 C.F.R. § 140.3(j)(1).[6] The regulation defines a physical or mental impairment as follows

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the

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[6] The ADA definition of a disability is almost identical to § 504: "the term disability means, with respect to an individual, (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ." 29 U.S.C. § 12102(2).

> following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive , digestive, genitourinary; hemic and lymphatic; skin; and endocrine; or . . . any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

34 C.F.R. 104.3(j)(2)(i). Under the regulations, "learning" is considered a major life activity. 34 C.F.R. 103.3(j)(2)(ii).

According to the United States Department of Labor, ADHD may fall within the § 504 definition of a physical or mental impairment. *See* Sept. 16, 1991 U.S. Department of Labor Memorandum. Whether ADHD is a disability for purposes of Title II and § 504 depends on whether the condition is so severe that it affects a major life activity - in this case, the ability to learn.

The symptoms of ADHD include developmentally inappropriate attention skills, impulsivity and hyperactivity. In support of their motion, the plaintiffs have provided affidavits and other evidence supporting their assertion that Kelly has symptoms of ADHD that effect her ability to learn. According to Mrs. Debord, Kelly is unable to concentrate and, consequently, it is difficult for her to complete homework assignments. Mrs. Debord also states that is not medicated properly, Kelly becomes destructive and argumentative. Dr. Kessler states in his affidavit that Kelly's ADHD causes her to be "unfocused" and "impulsive" which could cause her to seriously injure herself. Furthermore, Dr. Kessler states that without medication it would be difficult for Kelly to comply with her teacher's requests.

The defendants dispute that Kelly's condition affects her ability to learn. In support of this contention, they submitted Kelly's first grade report card showing that she received satisfactory marks. The defendants argue that the report card demonstrates that Kelly's ADHD does not affect her ability to learn.

The defendants fail to recognize, however, that if untreated Kelly's ADHD would clearly limit her ability to learn. If a child cannot focus or concentrate and is argumentative and impulsive, her ability to learn would clearly be affected. Based on the foregoing, the Court concludes that the plaintiffs have established that Kelly's condition affects her ability to learn. Consequently, Kelly has a disability for purposes of Title II and § 504.

In order to state a claim under Title II or § 504, the plaintiffs must show that Kelly was denied a service solely on the basis of her disability. *See Gieseking*, 672 F.Supp. at 1263. The defendants are also proscribed from denying a benefit or service solely on the basis of the severity of the disability. *Connor*, 839 F.Supp. at 1356. The plaintiffs argue that the school refused to administer Kelly's medication solely because of the severity of her ADHD. The defendants dispute this and assert that Kelly's medication was not administered because it exceeded the manufacturer's recommended dosage.

The record shows that the school district refused to administer the afternoon does of Ritalin SR to Kelly because doing so would have caused the total daily dosage to exceed the manufacturer's recommendation. The school's refusal was consistent with the district's policy against knowingly administering medication in an amount exceeding the recommended daily dosage. This policy applies to all students receiving prescription medication regardless of whether they have a disability. Based on the present record, it is clear that the school district decided not to administer the dosage, not because of Kelly's ADHD, but because the school was concerned about potential harm[7] to Kelly and about the district's potential liability. Furthermore, it is important to

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[7] The plaintiffs dispute whether the prescribed dosage of Ritalin is harmful to Kelly. However, the Court need not determine whether or not the dosage is proper. The Could must only determine whether the school's decision not to administer the dosage was based solely on Kelly's disability.

note that the defendants have not attempted to prevent Kelly from taking the prescribed dosage of SR at the prescribed time. Indeed, several reasonable accommodations have been proposed by the defendants which would allow Kelly to receive the dosage at the prescribed time. The proposed accommodations include allowing Kelly's parents or their designee to administer the medication at school or dismissing Kelly early from school to allow her to receive the medication at home.[8] The school district also offered to pay for a second opinion from a pediatric neurologist. These reasonable accommodations would have satisfied the legitimate interest of both the school and the plaintiffs. *See Wagner v. Fair Acres Geriatric Center,* 49 F.3d 1002, 1015 (3rd Cir. 1995). However, Kelly's parents refused all of the accommodations offere

Based on the foregoing, the Court concludes that the decision not to administer Kelly's medication was not based solely on her disability and that the school attempted to provide reasonable accommodations to Kelly. Consequently, because the plaintiffs have failed to establish at least one of the elements of a prima facie case of discrimination, the defendants are entitled to judgment as a matter of law as to the § 504 and Title II claims.

The plaintiffs also allege that the school district failed to comply with notice and other procedural safeguards required by § 504 and Title II. Section 504 regulations require a school district to provide notice "that it does not discriminate on the basis of handicap in violation of section 504." 35 C.F.R. § 104.8[9]. Accepted methods of providing such notice include the "posting of notices, publication in newspapers and magazines, placement of notices in recipients' publications, and distribution of memo-

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[8] The school offered to alter the class schedule so that early dismissal would not result in Kelly missing any academic classwork.

[9] Title II regulations have a similar notice requirement. *See* 28 C.F.R. § 35.106.

randa or other written communication." 35 C.F.R. § 104.8(a). The defendants provided evidence that they complied with this notice requirement by including the designated language in the school discipline code, mailed to each parent annually, and the school newsletter, published bi-annually. Section 504 regulations also require the school district to develop " a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing . . . and a review procedure." 34 C.F.R. § 104.36. However, these procedures only apply "with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services." *Id.* This provision does not apply to Kelly because the plaintiffs are not challenging any action taken by the district regarding the "identification, evaluation, or educational placement" of Kelly. The district has not taken and the plaintiffs have not requested any such action. In fact, the DeBords declined the district's offer to evaluate Kelly for § 504 eligibility and prepare a § 504 placement plan for her. Consequently, the Court concludes that the defendants did not violate the notice requirements of § 504 or Title II.

II. Section 1983 claims

In Count III, the plaintiffs allege constitutional violations pursuant to 42 U.S.C. § 1983. To state a cause of action under § 1983, the plaintiffs must show (1) that the defendants were acting under color of state law; (2) defendants' actions deprived them of rights protected under the United States Constitution or federal law; and (3) a direct causal link exists between the defendants' actions and the deprivation of the protected rights. *Gentry v. Lee's Summit, Missouri,* 10 F.3d 1340, 1342 (8th Cir. 1993). For purposes of this motion, the defendants concede that they were acting under color of state law. Therefore, the Court's analysis begins with whether the plaintiffs were deprived of a protected right.

The plaintiffs first argue that Kelly was denied access to health services afforded to all other students, and that this action deprived here of rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment.[10]

The Equal Protection Clause prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. As a result, all persons similarly situated must be treated alike. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). As a general rule, the challenged state action is presumed valid if the classification at issue is rationally related to a legitimate state interest.[11] *Id.* at 440. This standard of review is "highly deferential." *Batra v. Board of Regents of University of Nebraska,* 79 F.3d 717, 721 (8th Cir. 1996).

In the present case, the Court concludes that the plaintiffs have failed to state an equal protection claim. The plaintiffs have not shown that the school district treated Kelly differently from similarly-situated individuals. The record is absent of any indication that the school's policy of refusing to administer medication in dosages exceeding the recommended daily dosage was not applied evenhandedly. There is no evidence that other students received school-administered medication in amounts

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[10] Although the Court finds no reference to an equal protection claim in the complaint, both parties addressed such a claim in their summary judgment motions and responses. Thus, the Court will do so as well.

[11] A higher level of scrutiny applies if the statute or action classifies individuals on the basis of a suspect class, such as race or national origin, or impinges on a fundamental right. *Id.* However, the handicapped are not considered a suspect class. *Cleburne,* 473 U.S. at 446. Nor have the plaintiffs demonstrated that the refusal of the district to administer Kelly's medication impinges upon a fundamental right. Consequently, the higher level of review does not apply in this case and the district's actions are reviewed under the more lenient "rational basis" standard. *Batra v. Board of Regents of University of Nebraska,* 79 F.3d 717, 721 (8th Cir. 1996).

exceeding the recommended daily dosage while Kelly did not. Furthermore, the school's policy is not irrational or arbitrary. In order to survive rational basis review, the policy must only be rationally related to a legitimate state interest. *See Cleburne*, 473 U.S. at 446. The defendants have articulated two reasons for the policy: to prevent potential injury to the student's health and to prevent the school from incurring liability. The Court concludes that the decision not to administer medication in dosages exceeding the recommended daily amount is rationally related to the district's legitimate interest in protecting the health and well-being of the children it educates. Furthermore, the district has a legitimate interest in minimizing its potential liability when it administers medication or provides any other non-academic service to its students. Based on the foregoing, the Court concludes that the defendants are entitled to judgment as a matter of law on the plaintiffs' equal protection claims.

The plaintiffs next argue that they were denied procedural due process. In response, the defendants argue that the plaintiffs do not have a protected interest in the school's dispensation of medication to Kelly. Furthermore, even if the plaintiffs could establish a protected interest, the plaintiffs were provided with all the process they were due under the Fourteenth Amendment.

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property, without due process of law." U.S. Const. amend XIV. Thus, a procedural due process claim requires a deprivation of a property or liberty interest protected by the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Procedural due process triggered only when plaintiff has a "legitimate claim of entitlement" to a property interest. *Id.* This requires more than a "unilateral expectation" or an "abstract need or desire." *Id.* Protected interests arise from state law or other independent sources. *Id.* Thus, a protected property interest can be created by statute, ordinance, or by an express or implied contract. *Bishop v. Wood*,

426 U.S. 341, 344 (1976); *Perry v. Sindermann,* 408 U.S. 593, 601 (1972).

In this case, the plaintiffs have failed to show that they were deprived of a constitutionally protected property interest. They failed to cite a statute, ordinance, school policy, contract or other source creating a "legitimate claim of entitlement" to the dispensation of Kelly's medication by school personnel. Thus, the plaintiffs have not established that they were denied a benefit protected by procedural due process.

The plaintiffs also argue that they were denied a protected liberty interest without due process of law. Parents have a liberty interest in directing the upbringing of their children. *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972). This interest extends to the right of parents to make medical treatment decision for their children. *Parham v. J.R.,* 442 U.S. 584, 603-04. In this case, the plaintiffs argue that the defendants denied them their right to make medical treatment decisions for Kelly without due process of law. In support of this argument the plaintiffs cite *Matter of Baby K,* 832 F.Supp. 1022 (E.D. Va. 1993), a clearly distinguishable case in which a hospital sought to withhold ventilator treatment from an infant over the mother's objections. In the present case, the defendants have not attempted to prevent Kelly from receiving the course of treatment chosen by her parents. The defendants have not prevented Kelly from taking her prescribed dosage of Ritalin. As discussed above, the defendants have only refused to administer the medication to Kelly, and have offered to accommodate Kelly and her parents in a manner that would allow her to receive the medication at school, in the prescribed dosage and at the prescribed time. Consequently, the Court concludes that the defendants have not deprived the plaintiffs of a protected liberty interest.

Even assuming that the defendants deprived the plaintiffs of a protected liberty interest, the plaintiffs received all the process

due them under the Fourteenth Amendment. Procedural due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 310, 333 (1976). The opportunity to be heard is a flexible concept and is dependent on the particular circumstances of the situation. *Id.* at 334. In determining what process is due the Court must balance the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the value, if any, of additional procedural safeguards; and the government's interest. *Id.* at 335. In this case, the private interest affected, parental decisionmaking, is an important one. The district's interest in protecting students from potential harm and the district's financial interest in limiting its liability are also important. However, these interests must be evaluated in light of the adequacy of the procedures provided by the district.

In the present case, the plaintiffs had numerous opportunities to influence the defendants' decisions. The plaintiffs submitted to the school, through Dr. Kessler and their previous attorney, requests that the school administer Kelly's medication along with information on Ritalin and Kelly's condition and treatment. The district also conducted its own research on Ritalin. On March 13, 1996, the plaintiffs attended a meeting of the Ferguson-Florissant Board of Education and requested that the school administer Kelly's medication. On March 14, 1996, Mrs. DeBord wrote the president of the school board and provided additional information on Ritalin SR. On March 21, 1996, the plaintiffs were notified in writing that the school would not administer Kelly's medication in the prescribed dosage. The plaintiffs make no specific allegations as to how these procedures were inadequate.[12] Nor do the plaintiffs address the value of any additional

[12] Although the plaintiffs argue that they were denied the procedural safeguards outline in § 504 and Title II regulations, the Court has already concluded that the school complied with the notice and procedural requirements of these statutes.

procedural safeguards. Based on the foregoing, the Court concludes that the plaintiffs were provided with a meaningful opportunity to be heard. Therefore, the defendants are entitled to judgment as a matter of law as to the procedural due process claims.

An appropriate Order will accompany this Memorandum.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 26th day of November, 1996.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4196-CV-634 (CEJ)

ALLEN DEBORD, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE FERGUSON-FLORISSANT SCHOOL DISTRICT, et al.,

ORDER

In accordance with the Memorandum filed herewith this date,

IT IS HEREBY ORDERED that the motion of the plaintiffs for summary judgment is **denied**.

IT IS FURTHER ORDERED that the motion of the defendants for summary judgment is **granted**.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment in favor of the defendants and against the plaintiffs. The plaintiffs shall bear the costs.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 26th day of November, 1996.